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IN THE

Supreme Court of the United States

October Term, 1960

No. 465

DOYLE TERRY,

Petitioner,

vs.

STATE OF CALIFORNIA,

Petition for the Writ of Certiorari to the State of California, and to the District Court of Appeal of the State of California, Second Appellate District, Division One.

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DOYLE TERRY,

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vs.

STATE OF CALIFORNIA,

Petition for the Writ of Certiorari to the State of California, and to the District Court of Appeal of the State of California, Second Appellate District, Division One.

The petitioner, Doyle Terry, respectfully prays that a writ of certiorari issue to review a judgment of the District Court of Appeal of the State of California, in and for the Second Appellate District, Division One, in which the said judgment affirmed a judgment of conviction of the Superior Court of said State, in and for the County of Los Angeles, of three felonies, (1) Violation of Penal Code, Section 288, committed with a child; (2) a second violation of the same provision of the Penal Code involving a younger brother of the first child; and (3) violation of Section 286 of the Penal Code, the crime against nature committed upon the second child. The judgment imposes a penalty of a life maximum term of imprisonment. [*C. T. 1—Supplemental II.]

*Indicates Clerk's Transcript of Appeal.

Opinion Below.

The Opinion of the District Court of Appeal of the said State reviewing Court (an intermediate appellate Court), was rendered April 19, 1960, and is reported at 180 Advance California Appellate (Reports) at page 46. A petition for re-hearing was denied without opinion filed.

The Supreme Court of California, the highest Court of the State, summarily denied a petition for hearing without opinion on June 14, 1960, reported in the minutes at page 4 of 54 California Advanced (Reports), Volume 10.

Jurisdiction.

1. The judgment of said State reviewing Court, was dated and entered April 19, 1960, reported as above set forth.

2. A petition for hearing in the highest Court of the State, the California Supreme Court, was summarily denied without hearing or opinion, reported as above set forth, on June 14, 1960.

3. Upon application this Honorable Court extended the time to October 3, 1960, for the filing of the Petition for writ of certiorari by order dated September 12, 1960.

4. The statutory provisions believed to confer jurisdiction upon this Honorable Court to review the said judgment of the California reviewing Court, the highest State Court in which a decision could be had, by writ of certiorari are 28 U. S. C. A., Section 2101(d), and Rule 22(1) of the Rules of this Honorable Court.

Federal Question Presented.

1. Whether a judgment of a State Court should stand upon the reading of the testimony to the jury given by the alleged young victims, of sex abnormalities, at the preliminary examination, over defense objections when the record is clear that a judicial officer of the State permitted the witnesses to leave the jurisdiction and the prosecuting attorney, in a letter to the alleged vicims' father, suggested that the witnesses need not return to the California jurisdiction to give testimony at the trial as a condition of the original release, if there was any impelling reason for them not to return, the prosecutor arguing to the jury the impelling reason for the witnesses absence was "further embarrasement and poor school grades."

2. Whether the petitioner was accorded his Constitutional right to due process of law where the record reflects that responsible State authorities inadvertently or deliberately deprived the petitioner of the right to a fair and impartial trial in allowing the People's witnesses to leave the jurisdiction of the Court upon promise of their return for the trial and then the prosecutor's calculated suggestion that they do not re-appear as witnesses, and the reading of preliminary examination testimony of the alleged young victims to the jury over objections.

State Statutes Involved.

California Penal Code, Sec. 288;
California Penal Code, Sec. 286;
California Penal Code, Sec. 686(3);
California Penal Code, Sec. 879;
California Penal Code, Sec. 1008;

California Penal Code, Sec. 1334, Subds. 3 and 6;

California Penal Code, Sec. 1336;

California Constitution, Art. I, Sec. 13.

The text of these statutes is set forth in the Appendix to this petition.

Brief Statement of the Case.

The petitioner, Doyle Terry, was by information, filed by the District Attorney after preliminary examination and commitment by a magistrate, charged with sex crimes denounced by Section 288 of the Penal Code, in two counts, and one count of violation of Section 286 of the Penal Code of California. [C. T. pp. 1-3.] The accused entered a plea of not guilty [C. T. p. 5], the trial was by jury and resulted in guilty verdicts [R. T. p. 16]; a motion for a new trial was denied by the trial Court [C. T. p. 68]; the trial Court found the defendant to be a probable sexual psycopath and committed him to the State Hospital for a ninety day observation period [C. T. p. 69]; that upon returning from the State Hospital after a finding by the Medical Director that the defendant was not a sexual psycopath [R. T. p. 3 of Supplemental Transcript dated June 15, 1959]; the trial Court denied the application for probation and a judgment was rendered sentencing the defendant to the State Prison for the terms prescribed by law. [Supplemental C. T. II, p. 1.]

The defendant filed timely written notice of appeal [Supplemental C. T. II, p. 2], and the cause was transferred to the District Court of Appeal of the State of California, Second Appellate District for review pursuant to said Notice of Appeal.

Statement of Facts.

For the sake of brevity this statement of facts will be confined to the facts of the case pertinent to the questions involved, for the People's case depends and relies principally upon the absent witnesses testimony, given at the preliminary examination, read to the jury over objections.

It would serve no useful purpose here to relate in detail the testimony given at the preliminary examination by the alleged young victims of abnormal sex abuse, except that each specifically accused the petitioner of the violations.

After selection of the jury the Court, outside of the presence of the jury, inquired of the prosecutor if he was going to lay a foundation for the reading of the absent witnesses testimony (given at the preliminary examination), to the jury pursuant to Section 686 of the Penal Code. The prosecutor gave the Court an affirmative answer and defense counsel moved that the foundational testimony be taken out of the presence of the jury. [R. T. pp. 6-8.] The motion was denied by the trial Judge and the prosecutor was allowed to proceed with foundational testimony to which defense counsel objected to as prejudicial to the defendant's right to a fair and impartial trial and was granted a running objection to such testimony and procedure. [R. T. pp. 9-10.] The jury was instructed that the testimony was being introduced on the question of the propriety of allowing the prosecutor to read former testimony given at the preliminary examination of absent witnesses and that the jury was not to consider the foundational testimony on the question of guilt or innocence of the defendant on trial. [R. T. p. 11.]

A process server for the District Attorney's Office testified he received the subpoenas for the two alleged victim-witnesses; that he knew they resided at Arlington, Virginia. [R. T. pp. 13-18.] Objections made were overruled by the trial Judge to the question of whether he received any information where to serve the subpoenas [R. T. p. 21]; the Court's attention was again drawn to the jurors taking notes and the jurors remark they could not hear. The Court stated that the jury would again be admonished and if counsel indicated what questions would elicit prejudicial information the Court would excuse the jury, to which counsel stated that the defense could not tell in advance, particularly in going into a conversation, what would or would not be prejudicial to the rights of the defendant. [R. T. pp. 71-79.]

The witness was allowed to testify he instructed his secretary to call the father of the alleged victims, Captain Holden; that he talked to Captain Holden and the Captain said that he would not be in Los Angeles with his sons, the alleged victims, to testify at the trial of defendant, for on that date he would be in conference with the President of the United States and the children will be in school. [R. T. p. 35-36.] That the Captain related that he could not bring them out to testify at the trial or any time; that they already have had too much embarrassment, resulting in inferior grades in school; and the Captain wanted to know what had happened to the other defendants in the case. [R. T. pp. 37-38.] The Court admonished the jury they were not to consider the inference to the embarrassment of the boys. [R. T. pp. 37-38.]

On cross-examination the witness testified that he made the phone calls to Captain Holden and after send-

ing three letters, he did little or nothing to serve the subpoenas on the witnesses for their presence at the trial; that he had no intention of serving the subpoenas. [R. T. pp. 101-103.]

A second Investigator for the District Attorney testified that he received subpoenas for the witnesses on October 20 or 21, 1958, and in the outer lobby of the District Attorney's Office in the Hall of Justice in Los Angeles, California [R. T. p. 107], Captain Holden was not served with a subpoena made out in his name, but was served with subpoenas for his two sons, the alleged victims; that the two boys were not personally served with the subpoena, although he saw the two boys [R. T. pp. 107-110], and on the return of the subpoena's marked ". . . in care of Captain Richard Holden father, 10-21-58." [R. T. p. 111.]

While there was other foundational testimony it is passed over to the testimony of the particular prosecutor in charge of the prosecution of the case on trial. Mr. Howard, Deputy District Attorney, testified on cross-examination that he had heard that the witnesses were in Los Angeles on October 23, 1958, but did not show up in Court and by mutual consent of the prosecution and defense the case was put over for trial to another date. [R. T. p. 172.] The witness further testified that he considered the two alleged victims as "necessary" witnesses and the Court interrupted to add "not only necessary, they were essential witnesses." [R. T. p. 174.]

The People's witness, the Honorable Clark E. Stephens, Judge of the Superior Court, State of California in and for the County of Los Angeles, sitting in the Juvenile Court, testified that in making the order

to allow the victims to leave the State of California as "Non-delinquent" was with the provision that they return to be witnesses at the trial of this case. This testimony was given before the jury over objection of counsel. [R. T. pp. 145-146.]

The prosecutor in a letter to Captain Holden, the father of the two boys, stated in part ". . . if you have in your mind an impelling reason why they should not be here would you please write a letter and so indicate." [R. T. p. 208.]

In defense counsel's argument in support of the objection to the reading of the missing witnesses' testimony (at the preliminary examination), to the jury the federal question was raised that the reading of such testimony to the jury would be a denial of due process of law as the preliminary hearing was held as a consolidated hearing with another defendant (over objection), and that the transcript contained so much inadmissible matter so as to make it impossible to fairly extract the good from the bad. [R. T. pp. 244-251.]

It was called to the Trial Court's attention that the prosecutor would bring the witnesses back from out of state for the preliminary examination at county expense [R. T. p. 263]; further objection was made that the complaint only charged two offenses and after commitment by the magistrate the prosecutor filed an information charging three criminal offenses. [R. T. pp. 269-273.] It was also argued by defense counsel that due diligence was not established on the part of the people to show that the witnesses could not be served with subpoenas and brought before the court to testify. The Trial Court's reasons for over-ruling the objection and granting the motion of the people for the reading of

the testimony of the alleged victims at the preliminary examination to the jury is found in the Reporter's Transcript pages 284-295.

The trial of this case commenced with the prosecution reading to the jury the testimony given at the preliminary examination by the alleged victims. [R. T. pp. 351-474.]

The defendant pursued the federal question in the District Court of Appeal's Opening Brief pages 53, 62 and 71. The District Court of Appeal in affirming judgment of conviction considered the federal question in a manner not in accord with the decisions of this honorable court. For while the State Reviewing Court held that the appellant had a justifiable complaint to the use of foundational evidence before the jury and the reading of the missing witnesses former testimony to the jury, was not prejudicial or a violation of due process of law.

Manner Federal Question Was Raised.

The Federal question of violation of due process of law was raised in the Trial Court in presenting before the jury foundational evidence which was prejudicial to the defendant's right to a fair and impartial trial and the reading of the missing complainants testimony before the jury compounded the denial of the due process of law. [R. T. p. 250.] The Federal question was pursued in the District Court of Appeal of the State of California, Appellant's Opening Brief pages 53, 62, and 71, and further pursued in the Petition for Hearing to the Supreme Court of the State of California.

Summary of Argument.

Briefly stated the question presented to this honorable court is whether or not the defendant was deprived of a fair and impartial trial guaranteed to every accused by the due process of law clause of the Fourteenth Amendment of the Constitution of the United States, by the taking of foundational evidence, before the jury, on a question of law, which was highly irregular and prejudicial to defendant, and the reading of former testimony of witness whose absence was the result of responsible state authorities, including the prosecutor's suggestion that they may remain out of the jurisdiction and need not testify again, and thus depriving the accused of all the elements of a fair trial to be confronted by his accusers and to cross-examine them before the court and jury. The affirmance of the judgmgent of conviction by the Reviewing Court of California cannot be the means to an end of removing the accused from society because of the nature of the offenses charged with a total disregard of constitutional rights, for the Constitution is as much for the protection of the accused on trial as it is for the protection of the witnesses appearing against him, and certainly, one accused of offenses of this nature, charges that are easily brought and hard to disprove, needs every protection of his rights to obtain a fair and impartial trial.

ARGUMENT.

The Use of Testimony of Two Juvenile Witnesses Taken at Preliminary Examination Who Were Permitted by District Attorney to Leave and Remain Absent From the State Amounted to a Denial of Due Process in Violation of the 14th Amendment to Federal Constitution.

The taking of foundational evidence for the introduction of former testimony of the alleged victims at the preliminary examination for the purpose of reading it to the jury as evidence of guilt, over objection and the reading of such testimony to the jury and the Reviewing Court's affirmance of the judgment of conviction, is in direct conflict with applicable decision of this Honorable Court and diametrically opposed to a fair and impartial trial guaranteed to the accused by the due process of law clause of the Fourteenth Amendment to the Constitution of the United States. In the interest of brevity we will not here repeat the pertinent evidence but it now appears that the District Attorney was well aware that the Juvenile Judge was allowing the alleged victims to leave the jurisdiction of the Court. The prosecution returned these alleged victims at state expense as witnesses at the preliminary examination against the accused. The prosecutor in a method that might be termed legal gymnastics suggested in a letter to the father of these alleged victims that if some impelling reason could be given the boys would not have to return as witnesses at the trial of the defendant.

The District Attorney's investigator testified to an impelling reason why the father was not returning with his two sons as witnesses at the trial; that the father, Captain Holden, stated in a telephone conversation that he could not bring his sons to California to testify because he would be in conference with the President of the United States.

The testimony given by these two young boys at the preliminary examination, to the defendant's prejudice and deprivation of a fair and impartial trial, was read to the jury over objections of defense counsel at which time it was granted a denial of the due process of law.

The opinion of the California Reviewing Court in affirming the judgment attempts to white-wash this prejudicial foundational evidence presented by the prosecutor by stating that the father's importance as high government official in the armed services, who held conferences with the President of the United States, was offset by things which might be considered derogatory as a divorce or a lack of parental supervision.

The Reviewing Court's opinion that the procedure complained of was justified because the father of the boys said to the District Attorney's investigator that they have had too much embarrassment and were getting low grades in school certainly cannot justify the unconstitutional violation of due process of law, the right to be confronted by the alleged victims before the Court and jury and further cross-examination which is universally held to be the method of seeking the truth. It was the prosecutor's duty to produce the alleged victims as witnesses at the trial for testimony before the jury and the right of cross-examination by the defense or to dismiss the prosecution against the defendant.

In *People v. Kuranoff*, 100 Cal. App. 2d 673, at 676, the Court states:

> "The right of a defendant in a criminal action to be confronted by the witness against him, in the presence of the court, is a valuable and substantial one . . . . 'as this is a right clearly connected with his personal liberty, any statute purporting to impair the right is to be, liberally construed in his favor,' and the state must 'bring itself clearly within the provisions of that statute.'"

The Supreme Court of California in *People v. Kiihoa* (Feb. 29, 1960), 53 Adv. Cal. 751, held:

> "It is next contended that because there was no procurement of or active participation by the law enforcement agency in Stough's removal from the jurisdiction there was no state action which deprived the defendant of due process of law. The record does indicate that police did not arrange for Stough's absence. The critical question, however, is not necessarily one of improper conduct in bringing about Stough's absence, but rather, whether the defendant's conviction resulted from some form of trial in which his essential rights were disregarded or denied. We are persuaded that the circumstances surrounding this prosecution affected and militated against the defendant's right to a fair and impartial trial."

In the *Kiihoa* case, *supra*, the state authorities did not suffer the absence of the desired witnesses, while in the present case the witnesses were allowed to leave the jurisdiction of a Superior Court Judge with a prom-

ise that they would return as witnesses for the trial. The record shows that the prosecutor suggested that some impelling reason.

these witnesses need not appear at the trial if there was

The fact that the father, if it was a fact, was to be in conference with the President of the United States during that particular time, was not an impelling reason for the witnesses not appearing at the trial for it was the sons and not the father who were to be witnesses. Nor is embarrassment or low school marks an impelling reason for the absence of the witnesses for no one could be heard to say that a victim-witness in a case such as this would not be embarrassed and a psychological effect of giving such testimony would, no doubt, result in an emotional disturbance and impair efficiency to some extent. Such is not and cannot be the law, else in all such cases the victims would not have to appear as witnesses and be subjected to cross-examination, rights that are guaranteed by our Constitution.

In the present case there were statements and evidence given since the preliminary examination that could have been used as a vehicle of impeaching the alleged victims had they testified at the trial before the jury. The case of *People v. Kiihoa, supra*, follows the rule set down by this Honorable Court in *Motes v. United States*, 178 U. S. 458, in which it was demonstrated that it was not necessary to show that the state procured the witnesses' absence, but was not "responsible" for the witnesses' absence.

It has been, since the commencement of the trial to the present time, that the complained of state Court procedure deprived the accused of the right to a fair and impartial trial in violation of the due process of law clause of the Fourteenth Amendment of the Constitution of the United States and Article I, Section 13, of the California Constitution, specifically set up and pleaded in the State Courts for the protection of the accused against the wrongs of respondent.

Conclusion.

Wherefore, petitioner respectfully prays that a writ of certiorari be granted directed to the District Court of Appeal of the State of California in and for the Second Appellate District, Division One, to the end that a full hearing may be had herein, and to the end that this petitioner in the alternative may be discharged, and for such other and further relief as to the Court may seem fair and just.

Respectfully submitted,

RUSSELL E. PARSONS,

Attorney for Petitioner.

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STATE OF CALIFORNIA,

Respondent.

Respondent's Brief in Opposition to the Petition for Writ of Certiorari.

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Respondent.

Respondent's Brief in Opposition to the Petition for Writ of Certiorari.

Statement of the Case.

Petitioner was charged, and found by a jury to be guilty, of two counts of child molesting in violation of Section 288 of the California Penal Code and of Sodomy in violation of Section 286 of the California Penal Code. [Clk. Tr. p. 16.] He was sentenced to the State Prison for the term prescribed by law. [Supp. Clk. Tr. p. 1.] He filed a notice of appeal and the judgment of the trial court was affirmed in 180 A. C. A. 46, 4 Cal. Rept. 597. The petition for hearing in the State Supreme Court was denied on June 14, 1960.

Petitioner remained on bail pending the appeal's determination. The record in this case does not disclose it but we represent to the Court that he was subse-

quently convicted for an offense committed while on bail. The charge was that he shot a police officer without provocation. He was found guilty, sentenced to death, his motion for new trial was denied, and he is at present awaiting appellate review in that proceeding and the execution of the sentence.

Statement of the Facts:

There seems little purpose in setting forth an extended description of the facts constituting the crime. There has already been filed with the Court a certified copy of our brief in the reviewing court. In the unlikely event that this Court should have reason to refer to those facts, the summary we have compiled there may prove to be of assistance.

The chief issue on the appeal in the state courts, and the question raised in this Court, turns on the admissibility of prior testimony of the victims of the offense. Again, these are matters set out fully in our original brief. A fair summary of the evidence is contained in the opinion of the California District Court of Appeal. We shall not attempt to reproduce all of that evidence except insofar as it appears to be in issue here.

The evidence of conviction is almost wholly based on the testimony of the absent witnesses, the victims. This testimony was adduced at a preliminary hearing at which the absent witnesses testified, were confronted by petitioner and cross-examined at great length by him. This testimony was used at the trial when the boys did not show up.

When the police discovered the present offense they not only arrested and commenced proceedings against

appellant and his friends; they also took the two boys into custody. Pursuant to the request of this Court we have caused to be reproduced a certified copy of the records of the Juvenile Court of its proceedings in this matter and they are submitted herewith. Those records were introduced as exhibits at the trial and were before the trial judge in evaluating the admissibility of this evidence.

They disclose a sordid story. The boys had been placed in the custody of their mother when their parents were divorced. Their mother turned the boys over to a Mr. Breckenridge who was to take them on a trip to Las Vegas. Apparently he was not normal sexually. [Juv. Ct. Tr. p. 5]. The boys, 11 and 13 years old at the time of the offense, wrote home and one postcard "was pretty bad". The mother got upset and contacted the police. By this time the boys were in Los Angeles and had been turned over to appellant and his friends. [Juv. Ct. Tr. p. 6.]

The boys at the Juvenile Court Hearing did not want to return to their mother and wanted to be with their father. The boys' father had remarried [Juv. Ct. Tr. p. 7] and wanted them returned to him. He was stationed on the East Coast.

The father's attorney made the following representation to the Juvenile Court.

> "Captain Holden at the same time as he is anxious to have the boys with him also wants to cooperate with the Police Department so far as having Richard and Timothy made available for the preliminary hearing and the trial, if necessary . . ." [Juv. Ct. Tr. p. 8, lines 12-15.]

The attorney transmitted the father's suggestion that the boys be flown back to Washington with the understanding that the boys would be flown back for the preliminary hearing and the trial. [Juv. Ct. Tr. p. 9.]

The Juvenile Court judge did not make a decision at the hearing on August 7, 1958, but made an order detaining them in Juvenile Hall. [Deft. Ex. A and B Juvenile Court Records.] On August 20, 1958, after the preliminary hearing herein, the court ordered their release to the grandmother for transportation back to the father's residence, and they were so released on August 30, 1958. The court concluded that the best interests of the boys would be served by placing them with the father. The findings and orders of the Juvenile Court mention conversations with the District Attorney's office as to the need for the boys to appear in future trials and hearings.

Both the Chief Deputy District Attorney and the Superior Court Judge of the Juvenile Court appeared as witnesses when the trial court considered the foundation for the admission of the prior testimony. The Judge related that the boys fell into a non-delinquent group and that efforts are made to put such boys in the hands of a responsible person as soon as is reasonable. [Rep. Tr. pp. 154-155.] The Judge said he had told the District Attorney he could not detain a person in Juvenile Hall merely because he is a witness. He promised to elicit a guarantee from the person to whom they were released for their appearance at future in-

dicial proceedings. The Judge explained that he had to give first consideration to the welfare of the boys. [Rep. Tr. p. 155.] The District Attorney had said he would rely upon the judgment exercised by the Juvenile Court. The Juvenile Court Judge had occasion to meet Captain Holden during one of the proceedings and was satisfied with his integrity. He relied upon his statement that he would subsequently produce the boys. [Rep. Tr. p. 150.]

The District Attorney testified to the conversation in substantially similar terms. [Rep. Tr. pp. 203-205.] Meanwhile the trial of the case, set for October 25, had been continued to December 4, then to December 5, at appellant's request. The People then obtained a continuance to January 28. [Rep. Tr. pp. 169-170.] The boys and Captain Holden returned not only for the trial on October 25 but also for proceedings in other cases in which the boys were witnesses. On October 21, Captain Holden came into the District Attorney's office with a handful of subpoenas, "very much beside himself and very much concerned". He complained. The District Attorney said he could do nothing, but to pacify him indicated that the case might be disposed of other than by trial, as by plea. The District Attorney said too:

> "... 'we will notify you by letter if and when these cases are actually going to go to trial as to the dates, and if you decide that at that time you are not going to come out here, the children aren't going to be here, and if you have in your mind an

impelling reason why they shouldn't be here, will you please write a letter to us and so indicate." [Rep. Tr. p. 208, lines 8-13.]

It was not questioned at the trial that the boys actually were in Virginia at the time. The prosecution introduced considerable evidence as to phone conversations with the father, who said he thought it injurious to the boys to be brought across country with such frequency. [Rep. Tr. pp. 30-37.] Appellant was furnished with their address and phone number. In addition to the phone conversations letters were sent to the Hildens. [Rep. Tr. pp. 54-68; see People's Exs. 4, 5, 6.]

Prior to the continuance of the October 25 trial, a police officer discussed the case with counsel for petitioner, who was starting a murder trial, and waived the continuance for that reason. [Rep. Tr. p. 188.] He was informed that the boys and their father were going to be in Los Angeles and that it would inconvenience them to make another trip. Counsel replied that there were other trials too, and it would be just as easy to bring them out for all of them at once. [Rep. Tr. pp. 189-191.]

Question Presented

Did the use of the testimony from the former hearing violate petitioner's rights under the due process clause of the Fourteenth Amendment to the United States Constitution?

ARGUMENT.

I.

The Use of Former Testimony Is a Well Settled Practice and Violates None of Petitioner's Rights.

It is the universal practice under the common law in virtually all jurisdictions that, if an adequate foundation is laid, testimony from a former hearing may be used.

15 A. L. R. 495;

79 A. L. R. 1392;

122 A. L. R. 425;

159 A. L. R. 1240;

5 Wigmore on Evidence, Section 1398, and cases cited therein.

We do not feel that this court is prepared to hold that 500 years of judicial development and literally thousands of holdings are to be regarded as a transgression of due process.

This is, moreover, the federal practice as well. *Mattox v. United States*, 156 U. S. 237, 15 S. Ct. 333, 39 L. Ed. 409, contains a full consideration of the question and holds that the use of former testimony is proper in federal courts. (See too, *Franzen v. Du Pont*, 51 Fed. Supp. 578, 582; *Christofilos v. United States*, 200 Fed. Supp. 731, 741-743.) It is assumed that if this Court sanctions the practice in the courts it supervises under the Bill of Rights, no fault can be

found in the use of it by the State of California, as codified in Section 686(3) of its Penal Code.

We submit that the rights of petitioner were better protected here than they might have been elsewhere. Under federal law impeaching testimony may not be introduced without a foundation which, in the absence of the witness, it is difficult to lay. (See *Mattox, supra*; *Palakiko v. Harper*, 209 F. 2d 75, 103.) In California no foundation is needed in these circumstances. (*People v. Collup*, 27 Cal. 2d 829.) Under this rule appellant put in parts of the Juvenile Court transcript and various crime reports signed by the boys. [See Rep. Tr. pp. 459-469], as well as prior statements allegedly made by them, all of which purported to impeach.

Appellant also requested and received special instructions to the effect the jury could weigh the fact that the witnesses were not cross-examined in their presence. [Clk. Tr. p. 33.] The jury was also told that if they felt from the lack of opportunity for observing an absent witness they could not determine his credibility, that factor alone may create a reasonable doubt. [Clk. Tr. p. 34.]

Neither should his loss be overvalued. (*People v. Valdez*, 82 Cal. App. 2d 744, 749; 5 Wigmore on Evidence, Sec. 1396.) Appellant subjected the witnesses to an intensive examination at the preliminary hearing. The prosecution may have lost more by their absence than appellant.

II.

The Witnesses Were Not Unfairly Placed Beyond Petitioner's Reach.

Petitioner contends that the state ordered the witnesses across country, in effect becoming responsible for their absence, and then capitalized on it by utilizing their former testimony. He cites *People v. Kiihoa*, 53 Cal. 2d 748, 3 Cal. Rept. 1, 349 P. 2d 673, a holding to the effect that the prosecution cannot be responsible for the absence of a material witness and still prosecute. (*Cf., People v. Hammond*, 54 A. C. 884.) He feels that this holding controls the present case, yet it seems to us that there are important differences. It is not the District Attorney here who is ordering the boys out of the state. It is the Juvenile Court, a court which is acting as the trustee of the welfare of these boys. Under California law this court is bound by a consideration only of the welfare of the child. (*In re Singer*, 134 Cal. App. 2d 547, 551.) The court may not take into consideration other factors, such as their appearance at the criminal proceedings, unless it is consistent with their welfare. This is how the court approached the problem and this is how it solved it. The boys were placed with their father on his promise that he would return them for the criminal proceedings.

We submit that this Court should not lightly intrude on this standard of conduct set for the California Juvenile Courts. To upset it might induce these courts to act in a manner not consistent with the best interests of the children.

Consider what might have happened in the present case. It does not take a child psychologist to tell that these boys had endured an experience in being exposed

to a ring of homosexuals that could leave scars on their personalities for life. Nor do we need a child psychologist to tell us that it is important to terminate their adventures as soon as possible, to remove them from all possible contact with their homosexual companions, and to place them again in a normal family life with strict discipline. This is the course that the Juvenile Court took. The judge was plainly dissatisfied with the way the mother cared for the children. He had met the father, who had a military background, and who had remarried and could provide the kind of regularized family life the boys needed. 3000 miles away from all possible further contact with these individuals.

To relate these facts is to demonstrate the propriety of the court's action. It isn't even arguable but that it was the right thing to do. Why then should the state, which has no reasonable alternative but to do what is best for the children, be punished for doing that? We submit that when the state acts as a trustee of the welfare of the children it has no responsibility to see that the necessary acts it takes in that direction cause no injury to petitioner. However, here the state did not adopt a course of conduct bound to hurt petitioner. It secured the promise of a reputable person that the boys would testify as needed.

Petitioner suggests that the District Attorney induced the witnesses to stay away, yet the record does not bear him out. The District Attorney merely wanted to be informed if, in some eventuality, the witnesses could not return.

Petitioner relies on *Mates v. United States*, 178 U. S. 458, 20 S. Ct. Repts. 993, 999-999, 44 L. Ed. 1150. There the court held that the prosecution could

not build a foundation for the admission of evidence on its own negligence. The witnesses had been seen in the courthouse an hour before trial. There is no comparable conduct in the present case. Our situation is entirely different.

III.

Petitioner Was Not Hurt by the Manner in Which the Foundation Was Laid.

Petitioner claims federal error because the jury heard the evidence concerning the foundation. The reviewing court applied a well-defined rule in the law to the effect that while it is the better practice to hear legal questions in the absence of the jury, it is not improper to do so unless the minds of the jurors might be prejudiced thereby. (53 Am. Jur., Trial, §§21-23; Wharton's Criminal Law and Procedure, Vol. 5, p. 195.) The reviewing court did not find error in the taking of the foundation in front of the jury. It merely found that nothing had been said that really prejudiced petitioner. We fail to see any conceivable federal question here. Petitioner makes no complaint of the standard applied by the opinion. His only differences are over the factual determination. We do not feel that that is sufficient grounds for the intercession of the United States Supreme Court. The jury was told that it was not to consider what it heard on the question of guilt or innocence. [Rep. Tr. p. 11.] The purpose of the procedure was to explain the absence of the witnesses.

Conclusion.

It must be borne in mind that the question we are here concerned with is one of the admissibility of evidence. A criminal trial is an adversary proceeding an

petitioner was not precluded from ameliorating any possible loss he might have suffered. Prior to the time the witnesses left the jurisdiction he could have bonded them (Penal Code, Sec. 879) or he could have examined them further. (Penal Code, Secs. 1335-1340.) He did not, despite knowing that they would leave the jurisdiction and were upset about traveling across country so much. After they had refused to return to California he could have had them examined on commission (Penal Code, Secs. 1349-1362) or he might have attempted to compel their attendance. (Penal Code, Secs. 1334-1334.6; see, too, Va. Stats. 1950, Secs. 19-284, as amended in 1954.) There is more too he might have done to ameliorate his loss, by stipulation. It is not impossible to cross-examine over the telephone for example. His conduct at the trial reflected not a single effort to heal his alleged wounds. We cannot help but conclude that his interest was confined to capitalizing on the absence of the witnesses rather than securing their attendance or a substantial substitute therefore. As a result petitioner should not now be heard to complain of due process injuries. Respondent respectfully requests that the application of the petitioner be denied.

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